Supreme Court, U.S.
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No. 95-468

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NATIONAL ENQUIRER, INC., and
BARBARA HANNAH GRUFFERMAN,
Petitioners,

vs.

TAMARA HOOD AND CHRISTIAN
EDWARD MURPHY BY TAMARA HOOD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the First and Fourteenth Amendments permit a jury to consider imposing liability under state privacy laws for truthful publication about private persons with an unpublicized relationship to a public figure, if a jury could find that facts published were within the narrow range of facts within the intimate details of plaintiffs' lives, the disclosure of the facts could be found to be highly offensive to a reasonable person with ordinary sensibilities and were not newsworthy?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 2

A. The Article 2

B. The Court of Appeal's Decision 2

REASONS FOR DENYING THE WRIT 4

I. THE COURT OF APPEAL'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS 5

a. The California Rule Does Not Compel Self-Censorship 8

b. The Right to Privacy is a "State Interest of the Highest Order" 8

II. THERE IS NO CONFLICT AMONG CIRCUITS OR STATE SUPREME COURTS WARRANTING THE GRANTING OF THE PETITION 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Carlisle v. Faucett Publications,
201 Cal.App.2d 733 (1962) 3

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 7

Diaz v. Oakland Tribune, Inc.,
139 Cal.App.3d 118 (1983) 5

Florida Star v. B.J.F.,
491 U.S. 524 (1989) 7

Forsher v. Bugliosi,
26 Cal.3d 792 (1980) 5

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 4

Heller v. Norell Mutual Ins. Co.,
8 Cal.4th 30 (1994) 6

Hill v. National Collegiate Athletic Assn.,
7 Cal.4th 1 (1994) 6

Hustler Magazine, Inc. v. Falwell,
485 U.S. 46 (1988) 6

Virgil v. Time, Inc.,
527 F.2d 1122 (9th Cir. 1975) 5

TABLE OF AUTHORITIES (Cont'd)

Page

Wasser V. San Diego Union,
191 Cal.App.3d 1455, 1460 (1987) 5

STATUTES

Article I, Section 1 of the California Constitution . . 2, 3

OTHER

Rest.2d Torts, § 652D, com. h 6

Warren & Brandeis, *The Right to Privacy*,
4 Harv.L.Rev. 193 (1890) 7

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

No. 95-468

National Enquirer, Inc., and
Barbara Hannah Grufferman,
Petitioners,

v.

Tamara Hood and Christian
Edward Murphy by Tamara Hood,
Respondents.

**Petition for a Writ of Certiorari to the
California Court of Appeal
Second Appellate District**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent opposes the Petition for a Writ of Certiorari to review the unpublished judgment of the California Court of Appeal, Second Appellate District, entered in this case on March 10, 1995.

STATEMENT

A. The Article.

Plaintiffs have never sought publicity about their relationships with Eddie Murphy. No prior press report identified plaintiff Christian Edward Murphy as Mr. Murphy's son or Tamara Hood as Christian's mother. Plaintiffs sought only to be left alone in the privacy of their lives.

In September 1992 the National Enquirer shattered that privacy not only by identifying Christian as Eddie Murphy's son but by publishing detailed information about plaintiffs' financial affairs and information about where plaintiffs lived, including a photograph of the house. Plaintiffs had never disclosed such information publicly. None of this information was relevant to any public controversy. The only basis for any public interest in plaintiffs at all was based on their private connection to a prominent celebrity. This connection, though, was never published before and plaintiffs had sought and endeavored to keep this connection private.

B. The Court of Appeal's Decision.

The Court of Appeal's decision came in the context of the dismissal of all of plaintiffs' claims in the trial court on a demurrer without consideration of conflicting facts. Applying California law regarding the tort of "public disclosure of private facts" and the explicit right of privacy adopted by the voters in Article I, Section 1 of the California Constitution, the Court found that the trial court erred when it sustained the Enquirer's

First Amendment defense to plaintiffs' claims as a matter of law.[1]

On the "public disclosure of private facts" claim, the Court found that plaintiffs had sufficiently alleged the public disclosure of private facts in this case. Pet. App. 6a. The Court found that the issue of whether the disclosure of these facts would be considered highly offensive and objectionable to a reasonable person was an issue that could not be decided as a matter of law. Pet. App. 7a.

The Court also found that the issue of whether the Enquirer was privileged to publish such private information because it was "newsworthy" could not be decided in the context of a demurrer as a matter of law. The Court recognized that people with some connection to celebrities lose their privacy only "to some extent" and not completely. Pet. App. 10a, citing *Carlisle v. Faucett Publications*, 201 Cal.App.2d 733, 747 (1962). While recognizing that plaintiffs were not insulated completely from public exposure merely because they are not public figures and sought no publicity concerning their lives or their connection with Eddie Murphy, the Court found that it could not decide as a matter of law that plaintiffs' connection with a celebrity made all their financial affairs a matter of public concern. Pet. App. 13a.

The Court reached the same conclusion regarding plaintiffs' privacy claim under Article I, § 1 of the California Constitution. Pet. App. 25a. Finding that California's constitutional right of privacy protected

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[1] The Court of Appeal affirmed the dismissal of three other causes of action.

personal financial information, the Court found that the issue of whether plaintiffs had a reasonable expectation of privacy under the circumstances and whether the invasion of plaintiffs' privacy was serious enough to satisfy the requirements of California law could not be decided as a matter of law given the allegations in plaintiffs' complaint. Pet. App. 26a-27a.

The Supreme Court of California declined to review the Court of Appeal's unpublished decision and the trial court has resumed jurisdiction over the case.

REASONS FOR DENYING THE WRIT

There is nothing in the unpublished judgment and opinion by the Court of Appeal in this case which warrants review by this Court. This Court has never found that the First Amendment provides absolute protection for tabloid newspapers to print any information they uncover free from state laws protecting fundamental privacy interests. Indeed, the Court has repeatedly recognized the importance of such interests. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-346 (1974). Given the fact that the decision below is an interim, unpublished decision, this case is not a suitable vehicle for resolving potential conflicts between First Amendment and fundamental state-protected privacy rights.

I.

THE COURT OF APPEAL'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS

Nothing in the Court of Appeal's description of California privacy is at odds with this Court's cases. Unless this Court adopts the Enquirer's view that anything it prints is by definition a matter of public concern, states must be able to place limits on the media's disclosure of private facts. Any other view is tantamount to abdicating to the editors of the National Enquirer on the question of what is newsworthy. *See Virgil v. Time, Inc.*, 527 F.2d 1122, 1128-1130 (9th Cir. 1975).

California law circumscribes jury discretion in several ways in the context of both of the privacy claims upheld by the Court of Appeal. First, to prove a "public disclosure of private facts" claim a plaintiff must show that the facts disclosed fall within a narrow range of facts within the "intimate details of one's private life . . ." *Wasser V. San Diego Union*, 191 Cal.App.3d 1455, 1460 (1987). Next, the public disclosure must be shown to be highly offensive and objectionable to a reasonable person with ordinary sensibilities. *Forsher v. Bugliosi*, 26 Cal.3d 792, 809 (1980). If all of these elements are met the plaintiff still bears the burden of proving that the disclosure is not constitutionally protected as "newsworthy." *Diaz v. Oakland Tribune, Inc.*, 139 Cal.App.3d 118, 129-130 (1983).

The test for "newsworthiness" challenged by Petitioners fairly implements the general principle in the Restatement of Torts that "[s]ome reasonable proportion in also to be maintained between the event or activity

that makes the individual [newsworthy] and the private facts to which publicity is given." Rest.2d Torts, § 652D, com. h, p. 391. The Supreme Court has identified "the social value of the facts published "as one of the factors that may be used to guide a jury in determining whether this "reasonable proportion" is maintained. The use of this factor is in no way comparable to this Court's criticism of the concept of "outrageousness" in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Liability for privacy torts in California law cannot be based simply on jurors' tastes or views. The "public disclosure of private facts" tort in California offers substantial protection for free expression interests while upholding the right of Californians to be "let alone" in their private affairs.

The same is true of the California constitutional right of privacy as it has been expounded in *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1 (1994) and *Heller v. Norell Mutual Ins. Co.*, 8 Cal.4th 30 (1994). California's constitutional right of privacy is subject to countervailing interests, including the free expression rights of the media.

This Court has not held that states may not allow juries, with proper instructions, to balance an individual's right to the privacy of his or her financial or other intimate financial information against the public's right to information delivered through the press. Only if the Enquirer is the sole arbiter of the newsworthiness of private financial information in all circumstances may its position be sustained.

Moreover, the procedural posture of this case renders the alleged conflict posed by Petitioners illusory. The Court of Appeal did not endorse a particular set of jury instructions. All the Court did is find that plaintiffs'

privacy claims could not be dismissed as a matter of law. Thus, the precise standards to be applied by a jury have not yet been determined by the California court. Only after the California courts have reached a final decision on the precise standards to be applied by the jury on remand to strike the balance between plaintiffs' right of privacy and the Enquirer's right to publish what it pleases will it be possible to determine -- indeed, even question -- whether the balance drawn is constitutionally impermissible. Thus, the Petition is a premature attempt to invent a conflict with this Court's decisions that does not exist.

As this Court recognized in *Cox Broadcasting Corp. v. Cohn*, "[i]n this sphere of collision between claims of privacy and those of free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society." 420 U.S. 469, 491 (1975).[2] Indeed, this Court has repeatedly rejected arguments such as Petitioners' seeking a blanket immunity from state privacy laws for the publication of truthful information. As the Court said in *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989),

> Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring

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[2] Warren & Brandeis, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890). Of course, *Cox Broadcasting* concerned the disclosure of private facts contained in *public* records, not the disclosure of private facts about private people supplied to the media by informants.

scenarios which prudence counsels our not resolving anticipatorily.

This case is an inappropriate vehicle, especially in its current procedural posture, for this Court to revisit the media's invitation to eviscerate state law privacy protections.

a. **The California Rule Does Not Compel Self-Censorship.**

Petitioners misstate the question presented here in this section of their Petition. Respondents do not deny that a certain amount of breathing space for error in reporting on public figures and public issues is granted by the First Amendment and this Court's decisions. What Respondents argue is that this Complaint adequately alleges that the breathing space was exhausted by the Respondents' outrageous behavior. The Court of Appeal's decision does not restrict any breathing space; it merely holds that the question of its extent is for the jury to decide.

b. **The Right to Privacy is a "State Interest of the Highest Order."**

Petitioners make the strange claim that the public disclosure of intimate private facts about individuals does not trigger an important state interest so long as the facts are true. Petitioners claim that this Court's decisions in *New York Times v. Sullivan*, and its progeny, support their claimed absolute immunity from liability. But this Court's decisions in the area of defamation do not address the issue of a state's interest in preserving intimate

personal information from disclosure. This interest is different from the state's interest in protecting an individual's reputation from defamatory falsehood and is clearly a "state interest of the highest order."

II.

THERE IS NO CONFLICT AMONG CIRCUITS OR STATE SUPREME COURTS WARRANTING THE GRANTING OF THE PETITION

The cases cited by Petitioners do not present the kind of irreconcilable, clear conflict between Federal Circuits and State Supreme Courts and the interim, unpublished decision by the California Court of Appeal in this case that warrants plenary review in this Court. There has been no wholesale abrogation of state privacy laws as they apply to the media. This Court may be required to address this issue in the future but this case is not an appropriate case in which to consider the immunity claimed by the Enquirer.

CONCLUSION

For all of these reasons the Petition should be denied.

Respectfully submitted,

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